Supreme Court, U.S.
FILED
JAN 3 1 2000
CLERK

No. 99-1103

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

BEVERLY B. MANN,
Petitioner,

v.

THE CITY OF CHICAGO, a Municipal Corporation, JAMES D. MONTGOMERY, TIMOTHY D. O'HARA and JAYNE W. BARNARD,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RECEIVED
FEB 0 2 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Beverly B. Mann
Petitioner *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

23 pp

TABLE OF CONTENTS

Table of Authorities ii

Citation To, And Discussion Of, New Authority Of The United States Court of Appeals For The Seventh Circuit.....1

I. The Availability of Circuit Rule 53 as a Mechanism by which the Court May Quietly, Arbitrarily and Without Explanation Depart from the Common Law Without Changing the Common Law is More Subversive of the Rule of Law than the Proposition that Judge Easterbrook in His Dissent in *Gray-Bey v. USA* Rejects as Doing Exactly that, and Has No Appropriate Place in the American System of Justice.....1

II. It is, Perhaps Most of All, the Enabling of Convenient Fictions (of the Sort Illustrated by Contrasting *Bellaver v. Quanex Corp.* with the Court's Handling of the Identical Issue in This Case) that Renders the Supposedly Procedural Circuit Rule 53 and Its Counterparts Legal Abominations.....8

INDEX TO APPENDIX

Appendix A .....A – 1 - 9

TABLE OF AUTHORITIES

Opinions of the Court of Appeals for the Seventh Circuit
Issued in January, 2000

Bellaver v. Quanex Corp.,
98-3708 (7th Cir. Jan. 18, 2000) 8-10

Gray-Bey v. USA, 99-4131 (7th Cir. Jan. 7, 2000) 1-8, 10

United States Supreme Court Opinions

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).....9, 10

Oncale v. Sundowner Offshore Servs., Inc.,
118 S.Ct. 998 (1998) 9, 10

Burlington Industries, Inc. v. Ellerth,
118 S.Ct. 2257 (1998) 9, 10

CITATION TO, AND DISCUSSION OF, NEW AUTHORITY OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I. THE AVAILABILITY OF CIRCUIT RULE 53 AS A MECHANISM BY WHICH THE COURT MAY QUIETLY, ARBITRARILY AND WITHOUT EXPLANATION DEPART FROM THE COMMON LAW WITHOUT CHANGING THE COMMON LAW IS MORE SUBVERSIVE OF THE RULE OF LAW THAN THE PROPOSITION THAT JUDGE EASTERBROOK IN HIS DISSENT IN *GRAY-BEY V. USA* REJECTS AS DOING EXACTLY THAT, AND HAS NO APPROPRIATE PLACE IN THE AMERICAN SYSTEM OF JUSTICE.

On January 7, 2000, the United States Court of Appeals for the Seventh Circuit issued an unpublished order pursuant to its Circuit Rule 53 (which permits the unpublished and summary resolution of appeals) in *Gray-Bey v. USA*, 99-4131, a habeas-petition case concerning an application for a certificate of appealability for an order authorizing the district court to entertain a second and successive petition for collateral review. The threshold subject of the unpublished order was the nature of 28 U.S.C. sec. 2244(b)(3) – specifically whether appellate courts can depart from that statutory subsection's stated requirement that the court rule upon the merits of the application within 30 days of its filing, which in that case was the date of issuance of the unpublished order.

The threshold issue pertaining to the merits of the application in that case was whether the applicant had waived – or as the dissent in that case termed it, forfeited – the grounds upon which he based his application because he had not asserted them in his initial collateral appeal.

The dissenting judge, apparently at whose behest the initially unpublished order was published as an opinion on January 24, 2000, stated his belief that the 30-day-time-limit

language of the statutory subsection is mandatory. He also expressed his belief both that the court lacks the legal authority to depart from mandatory language of a statute (presumably, absent unconstitutionality of the mandate language) and that the applicant in that case indeed had forfeited his substantive grounds for collateral review by failing to assert them in his initial habeas petition.

That judge in arguing the former point said, "In the end, the majority's approach rests on the proposition that federal judges have discretion to depart from federal statutes for good reasons – and that judges, rather than the political branches, define which reasons are 'good.' Few propositions could be more subversive of the rule of law." The judge in arguing the latter point, the one concerning the forfeiture of defenses, engaged in extensive analysis concerning the time limitations included in the statute at issue.

The petition for writ of certiorari that this supplemental brief supports concerns a purely civil lawsuit; the statute at issue in *Gray-Bey* is not at issue in this case. Yet the dissent in *Gray-Bey*, because of the specifics of its language and the identity of its author, Judge Frank Easterbrook (who, as the petition for writ of certiorari in this case discusses, headed the panel that issued the unpublished order that resolved the second set of appeals in the case), is relevant to the issues addressed in the section of the petition that appears at pp. 10-27.

The pertinent portions of Judge Easterbrook's dissent in *Gray-Bey* read:

> [Gray-Bey's] initial problem – one that does not make my colleagues' list of four issues to be briefed – is time....
>
> Only subsection (3) might authorize Gray-Bey's application in December 1999, more than six years after his conviction was affirmed (and more than three years after Congress added the one-year period of limitations to the law of collateral attack). *But the "right" that Gray-Bey wants to assert "was initially recognized by the Supreme Court" on December 6,*

1995, in Bailey v. United States, 516 U.S. 137 (1995), *more than four years before Gray-Bey filed his application. Far from being unavailable to Gray-Bey until now, Bailey came in time for Gray-Bey to present it on his first collateral attack. Gray-Bey lost not because Bailey is prospective only, but because he neglected to make the argument in the district court even though certiorari had been granted in Bailey on April 17, 1995, and the issue had been percolating for years*. 156 F.3d at 742-43. [Emphasis added.]

Gray-Bey now points to *Bousley v. United States*, 523 U.S. 614 (1998), which held that implementation of 18 U.S.C. sec. 924(c)(1) (the statute construed in *Bailey*) can lead to constitutional problems cognizable on collateral attack. Improper advice to a defendant pleading guilty could make the plea unintelligent, *Bousley* held; similarly, a trial record that lacks evidence adequate to establish all elements of the offense (as *Bailey* defines them) could support collateral relief to avoid imprisoning an innocent person. But these are not new principles of constitutional law. *Davis v. United States*, 417 U.S. 333 (1974), establishes that actual innocence justifies collateral relief under sec. 2255, cf. *Jackson v. Virginia*, 443 U.S. 307 (1979), and the rule that involuntary guilty pleas may be set aside is even older. More than a year before *Bousley*, we applied these principles in collateral attacks based on *Bailey*. E.g., *Stanback v. United States*, 113 F.3d 651 (7th Cir. 1997).

Gray-Bey's first collateral attack failed solely because he should have raised the issue sooner; that conclusion is incompatible with his current submission that 1997 or 1998 was too soon to invoke *Bailey*. Nothing that happened in 1998 restarts the time for a collateral attack. *The initial principle of Bailey, which is the crucial time under sec. 2255 para. 6, dates from*

1995, and the retroactivity rules predate Bousley.... [Emphasis added.]

In re Davenport, 147 F.3d 605, 609 (7th Cir. 1998), *requires us to ask whether Gray-Bey's initial sec. 2255 motion gave him "a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence."* In *Davenport* this court held that when the basis of the claim has not been legally established at the time of the first petition, the prisoner has not received a reasonable opportunity. The first petition filed by Sherman Nichols (one of two petitioners in *Davenport*) was resolved before the Supreme Court issued *Bailey*, and the law in this circuit was contrary to the way *Bailey* interpreted the word "use" in sec. 924(c)(1). Nichols therefore could not have obtained relief by a sec. 2255 petition. Gray-Bey, however, is differently situated. [Emphasis added.]

Gray-Bey filed his first sec. 2255 petition before Bailey, but final decision came later. Had Gray-Bey properly preserved an argument about the meaning of "use" in sec. 924 (c)(1), it would have been decided by this court, under correct principles of law, on his first sec. 2255 petition. Had we erred, the Supreme Court could have corrected us by certiorari. The reason Gray-Bey did not receive a decision was his own default. *It is impossible to say that "the remedy by motion [under sec. 2255] is inadequate or ineffective to test the legality of his detention" when the only shortcoming is the petitioner's omission of an issue. That omission is not a problem in the remedy; it is a problem in litigation strategy.* It is, indeed, a fatal problem, for when *Bousley* held that *Bailey* can support collateral review, the Justices stressed that the legal arguments must have been presented to the district court--and they added that the weight of existing precedent against a position does not justify

omission. *Bousley*, 523 U.S. at 622-23.... [Emphasis added.]

Next in logical sequence, if Gray-Bey's application were timely, would be the question whether a successive petition may be justified under sec. 2255 para. 8(2) on the ground that *Bailey* is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

Bousley, which was decided while Gray-Bey's prior appeal was pending, holds that Bailey claims may be raised on collateral review, and that *Bailey* may be applied retroactively to at least some cases (though perhaps *Bousley* himself was not a beneficiary, having forfeited his claim). There is a nice question about the scope of sec. 2255 para. 8(2):

> Does the successive petition have to assert reliance on a "new rule," or is an old rule newly made retroactive enough?

From Gray-Bey's perspective, however, *Bailey* is not a "new rule", as I have already observed; he argued it in 1997 when briefing his appeal.

Had we rejected that claim on the ground that *Bailey* does not apply retroactively, then it would be tempting to say that *Bousley* reopens the door. But because Gray-Bey lost on forfeiture rather than the merits, one would think that the kind of new rule adequate to start a new period must be one that retroactively changes the law of forfeiture, rather than a decision making explicit that Bailey "applies."

We need not wrestle this one to the ground, however, because *Bousley* does not make retroactive a new rule "of constitutional law".

Bailey resolved an issue of statutory interpretation, and *Bousley* observed that the proper understanding of sec. 924(c)(1) may lead to collateral relief to the extent that a statutory error gives rise to a constitutional flaw. In *Bousley* itself the potential flaw was an involuntary

> guilty plea (made involuntary by the fact that the defendant did not know the elements of the offense to which he was pleading). This is related to the approach our court earlier adopted for *Bailey* issues in *Stanback*. Similarly a statutory problem could give rise to a constitutional one if the record did not contain enough evidence to permit a rational trier of fact to find guilt beyond a reasonable doubt. As *Bousley* observed, however, defendants trying to take advantage of that possibility have a heavy burden, for they must show not only that the record fails to establish "use" but also that they did not "carry" the weapon, the other way to commit the crime.....
>
> Does *Bousley* make retroactive a "new rule of constitutional law" that the evidence must be sufficient to support the charge? Not at all; that rule has been around since *Davis* and *Jackson*. Gray-Bey's second principal contention, that the jury instructions in his case did not anticipate *Bailey*, is not even a constitutional argument, for the reasons given in *Young v. United States*, 124 F.3d 794, 798-99 (7th Cir. 1997).... I therefore conclude that a successive petition cannot be authorized under sec. 2255 para. 8. *Gray-Bey must live with the forfeiture in his prior petition*, just as our published opinion concludes. [Emphasis added.]

Those statements, when coupled with the unpublished order in the appeals in this petitioner's case, suggest a belief, at least by Judge Easterbrook, that common law, however unremittingly consistent, is not a part of the rule of law but is instead, at best, a rule of thumb. In this petitioner's case, Judge Easterbrook and his colleagues ostensibly found the issue of waiver (or forfeiture) of defenses among those unworthy even of their discussion, although the common law of their circuit certainly and unfailingly *appears* to have established it as a rule of law when (as in *Gray-Bey* and in the

petitioner's case) the defenses were available, if at all, at the time of the initial appeal in the case.

It may be that, as Judge Easterbrook said in his dissent in *Gray-Bey*, the approach of the majority in that case "rests on the proposition that federal judges have discretion to depart from federal statutes for good reasons – and that judges, rather than the political branches, define which reasons are 'good.'" It may be also that, as the judge said, few propositions could be more subversive of the rule of law; it is not the purpose of this brief to address the merits of that statement. But at least the reasons for the departure in *Gray-Bey* were "good." And even if not good, at least they were defined.

The petition in this case asserts that federal appellate judges – who do have discretion to amend or repeal federal common law in a manner not inconsistent with the Constitution or with the holdings of this Court – nonetheless lack the discretion to quietly depart in arbitrarily selected cases from the pertinent law, whatever the manner in which that law was promulgated. The petition asserts, in other words, that federal appellate judges lack the discretion to depart from the law without changing that law, and that their quiet assumption of the power to do so in this case (and presumably in others) violates the Constitution's Fifth Amendment.

The availability of Circuit Rule 53 as a mechanism by which the court may quietly, arbitrarily and without explanation *depart from the common law without changing the common law*, as occurred in this case, is, this petitioner submits, more subversive of the rule of law than the proposition that Judge Easterbrook in his dissent in *Gray-Bey* rejects. It has no appropriate place in the American system of justice.

Judge Easterbrook's lament about the subversion of the rule of law presumes, of course, that such a thing as the rule of law still exists. The petition in this case argues that the Seventh Circuit's Rule 53 and its counterparts in the other circuits have rendered appellate-court application of the law merely optional and thus have subverted the very concept of the rule of law. If so, Judge Easterbrook need not worry about

his colleagues' subversion in *Gray-Bey* of the rule of law, as it is logically impossible to subvert what does not, in any event, exist.

That judge, who in *Gray-Bey* so meticulously juxtaposed the procedural chronology of that case with the chronological development of the case authority he cited in support of his dissenting finding that Gray-Bey had forfeited his defenses, nonetheless in *this* case was content to both rely upon and to conveniently ignore case authority issued years before the resolution of the initial appeals in the case, in *reversing, without explanation*, the rulings in those initial appeals. No timeliness inquiry here; only a finding that timeliness was an issue unworthy of the court's discussion.

"The issue had been percolating for years," the judge said in his dissent in *Gray-Bey*. But in this case, no such analysis; in fact, no analysis at all. In this case, a gimmicky word-game approach sufficed.

Judge Easterbrook should have worried about the subversion of the rule of law when he himself could have closed the barn door before the horses escaped.

II. IT IS, PERHAPS MOST OF ALL, THE EASY ENABLING OF CONVENIENT FICTIONS (OF THE SORT ILLUSTRATED BY CONTRASTING *BELLAVER V. QUANEX CORP.* WITH THE COURT'S HANDLING OF THE IDENTICAL ISSUE IN THIS CASE) THAT RENDERS THE SUPPOSEDLY PROCEDURAL CIRCUIT RULE 53 AND ITS COUNTERPARTS LEGAL ABOMINATIONS.

Virtually throughout the very lengthy pendency of this litigation, this petitioner has seen the issuance of one after another appellate or Supreme Court opinion that appeared to favorably (for her) determine one or another issue in this litigation, only to later see the appellate panel in her case fail, courtesy of Circuit Rule 53, even to acknowledge the existence of those *issues*. On January 18, 2000, a panel of the court of appeals for the Seventh Circuit issued an opinion, in *Bellaver v. Quanex Corp.*, 98-3708, that, when compared with

that court's handling of the identical issue in this lawsuit yet again illustrates the substantive effect upon the law that the ostensibly procedural Circuit Rule 53 has had.

The issue is gender stereotyping as this Court addressed it in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The district court in this petitioner's case said that *Price Waterhouse* applies only to accountants and requires expert testimony to establish gender stereotyping. The district court also said the petitioner could not prevail because she had not established that defendant James Montgomery, the City of Chicago's corporation counsel, was aware of the discriminatory motive and therefore had no reason to disbelieve the accuracy of defendant Timothy O'Hara's submitted evaluations of the petitioner's job performance.

The petitioner had addressed the gender discrimination issue extensively in her opening brief in the first set of appeals in this litigation, arguing that the district court's memorandum opinion, 1994 U.S. Dist. LEXIS 9893 (Jul. 18, 1994, 84 C 11020 N.D. Ill.), which stated the reasons for his summary judgments entered three years earlier in the case, contained statements of purported law that conflicted directly with this Court's rulings in *Price Waterhouse*. The issue, in fact, occupied the first nine pages of the "Argument" section of that brief. (See this brief's Appendix A). Yet the unpublished order that resolved that set of appeals did not even acknowledge the existence of the issue.

In the recent set of appeals, the petitioner again argued the issue, citing *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S.Ct. 998 (1998), and *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998), both of which, she asserted, directly contradict statements of law contained in that 1994 memorandum opinion. But the issue was among those on the laundry list that the appellate panel said was unworthy of its discussion.

The petitioner does not claim here that *Bellaver* constitutes new law of the Seventh Circuit and that it must be applied retroactively to her case. She asserts the contrary; she argues that *Bellaver* merely applied the law as delineated in

1989 in *Price Waterhouse*, and in 1998 in *Ellerth* and *Oncale* – law that she was entitled to have the appellate court consider in her own appeals, law that was not considered in her appeals because Circuit Rule 53 invited the convenient fiction that this and other significant issues in the case *did not even exist*.

It is, perhaps most of all, this encouraging of convenient fictions that renders these supposedly procedural circuit rules legal abominations. Subversion of the rule of law? Which law, exactly – the published law or the secretly decreed law? They are not the same.

Respectfully submitted,

Beverly Mann
Petitioner *Pro Se*

APPENDIX

I. COUNTS VII AND XIII - U.S. SUPREME COURT PRECEDENT ESTABLISHES THE CHARGED CONDUCT AS UNLAWFUL GENDER DISCRIMINATION

II.

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees assuming or insisting that they matched the stereotype associated with their group, for ... Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. (Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1791.) In the specific context of sex stereotyping, *an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, had acted on the basis of gender.* (Price Waterhouse, at 1790-91. Emphasis added.) *An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22; out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.* (Price Waterhouse, at 1791. Emphasis added.)

Or maybe not. District Judge Lindberg stated that he granted summary judgment in favor of the defendants in Mann's two gender-based claims partly because the defendants' proffered justification for their conduct -- that Mann was "too pushy or aggressive and lacked humility" -- was, as a matter of law, "a legitimate nondiscriminatory reason for plaintiff's termination." (App. at A-59 -61.) This charge against Mann, the judge said, was not gender-specific; it was a gender-neutral charge that Mann had "poor interpersonal skills." (App. at A-59 -61.)

The record is clear that the charge of aggressiveness against Mann concerned only her conduct in court, not her

relations with anyone outside of court; Timothy O'Hara, upon whose representations Montgomery and Barnard purported to rely as the basis for the decision to discharge Mann, testified that he himself "liked" Mann when they worked together (Tr. 371), and nowhere in the record is there any allegation that Mann had what the judge termed poor interpersonal skills in her relations with anyone but judges in court. The complaint by O'Hara against Mann that she lacked sufficient humility about "her accomplishments," as O'Hara put it, is evidence solely that O'Hara harbored resentment that Mann *had* accomplishments, hardly a legitimate nondiscriminatory reason, as a matter of law, to discharge Mann rather than O'Hara.

The judge in his Memorandum Opinion never mentioned the nature of the conduct that he said constituted poor interpersonal skills, and he never acknowledged the language from Price Waterhouse that held, *expressly*, that the characterization used against Mann -- a description of her as too aggressive in a traditionally male job, a job that by its nature requires aggressiveness -- is not gender-neutral but clearly gender-specific and constitutes unlawful gender-based discrimination. In granting summary judgment without citing the nature of the conduct at issue, the judge effectively held that it is not the substance of the conduct that determines viability as a defense, but rather the choice of generic labels used to describe that conduct. For that proposition, he cited none other than Price Waterhouse. (App. at A-59.)

In rejecting the precedent of Price Waterhouse, the judge said:

> Plaintiff at bar had no evidence remotely similar to that in Price Waterhouse; she presented no evidence of overtly sex-based comments that affected the decision to terminate her, presented no expert testimony that gender-neutral remarks were the product of sex stereotyping, and presented no evidence that other fe-

male employees were evaluated in sex-based terms. (App. at A-60.)

Apparently, Judge Lindberg does not consider the justices of the Supreme Court sufficiently expert in the subject of sex stereotyping for him to accept their finding on the issue, and he therefore considered himself at liberty to reject it. Perhaps before she relied upon Price Waterhouse as authority, Mann should have qualified Justice Brennan, its author, as an expert on the subject. Or perhaps she should have enunciated to this judge what is an elementary tenet of law: that apart from the separate issue of whether or not the plaintiff in Price Waterhouse was *required* to produce expert testimony as part of her *prima facie* case to establish her premise, the plaintiff in that case *did* establish her premise as a matter of law, and that once that premise was established, subsequent litigants need not reestablish the same point of law by use of an expert or otherwise.

Moreover, Mann *was* prepared to produce expert testimony -- the testimony of *two* experts, in fact -- to support her claim that aggressiveness in court is part and parcel of a litigator's job, even when it results in conflict with judges. Her experts, unlike the one in Price Waterhouse, weren't social psychologists, though. They were litigators. One was a colleague of Mann's in the Torts Division, an attorney named John Dugan, whose name appeared on Mann's witness list and whose deposition testimony was included in Mann's response to the summary judgment motion. Dugan testified that he had had many confrontations with judges in court when representing the City, and that O'Hara was aware of these confrontations. Dugan also testified that in his expert opinion as an experienced litigator, such problems were unavoidable (Doc. # 320, Dugan dep. at 64-65).

Mann also was prepared to produce the expert testimony of Montgomery, whose name appeared on Mann's witness list and who eventually testified at the trial of the

BEST AVAILABLE COPY

remaining counts that as a litigator he himself "regularly" had had conflicts with judges in court (Tr. 103.) Montgomery, a male, doubled as an expert witness and as an occurrence witness; he was both an experienced litigator and the decisionmaker about whom the judge said "there was no evidence that he would have considered the same traits as positive or even neutral in a male employee" (App. at A-59).

On the issue of the gender-specific nature of O'Hara's complaint that Mann lacked humility, the district court has stated in its Memorandum Opinion that it based its summary judgment on this issue not upon a rejection of Mann's account of the evidence but upon an adoption of it. O'Hara, whose name appeared on Mann's witness list, served as a proffered expert in support of Mann's position on this issue; he submitted a job performance evaluation of Dugan, a male, *praising him for being "pridefully boastful"* (Pltf's Exh. 15) *and took no retaliatory action against him as he did against Mann.* O'Hara's testimony would serve the same role in this case as did the testimony of the social psychologist in Price Waterhouse.

As for the judge's claim that Mann was required as part of her *prima facie* case to present the expert testimony of a social psychologist because the plaintiff in Price Waterhouse did so, Mann simply cites to Federal Rule of Evidence 702. That Rule begins, "If scientific, technical, or other specialized knowledge will assist the trier of fact ...." In fact, there are a lot of people whose knowledge on this issue is all too specialized, but they are not social psychologists. They are women litigators, and precious few have found their way to the federal district bench, almost none to the federal appellate bench. So Mann obliges the district judge and presents their expert opinions here:

> Discrimination in the Courts: Supreme Court task forces on gender bias in the courts have documented the variety of disparate and demeaning behavior

> women often encounter.... The studies report that women's arguments and courtroom demeanor are likely to draw far more comments, including reprimands for being too aggressive, when more aggravated conduct by male attorneys goes unquestioned." The American Bar Association Commission on Women in the Profession Report to the House of Delegates, approved by the House of Delegates on August 10, 1988, at p. 9-10.

Even Judge Lindberg might concede that as women litigators, those who participated in these studies have specialized knowledge on this issue that would assist *triers of fact*, a term of art here, such as he.

"Because most judges are men, who have experienced the traditional norms of male socialization, their instinctive reaction is to accept the perspective of the employer." Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1203 (1989). Judge Lindberg, in proclaiming as facially gender-neutral and as evidence of poor interpersonal skills a charge against a litigation attorney that she is too aggressive in court, has provided a glaring testimonial to the reason why the right to a jury trial, when provided by law as it is on Mann's Count VII, is a fundamental one.

This judge stated that in Price Waterhouse "there was very strong evidence of sexual stereotyping in the employment decision," but had that case been before him he would have resolved it as he did Mann's case: with entry of summary judgment for the defendants and a Memorandum Opinion that spewed a litany of nonspecific and conclusory platitudes and proclaimed in blanket fashion that there was no evidence to support the plaintiff's allegations. This judge does not like the laws by which both these cases were brought, and he will not enforce them. It is that simple, and it is the sum and substance of what this appeal is about.

Nor is this judge forthright in citing Price Waterhouse as authority that requires Mann to have produced evidence "that other female employees were evaluated in sex-based terms." The plaintiff in Price Waterhouse did not claim that anyone other than she was evaluated in gender-specific terms, and the law unequivocally requires no such claim; gender-based discrimination is gender-based discrimination, even when it occurs against only one member of that gender among many in the potential pool, as is often the situation in *quid pro quo* harassment cases. Meritor Savings Bank v. Vinson, 477 U.S. 57; Texas Dept. of Community Affairs v. Burdine; 450 U.S. 248, 252-56; King v. Board of Regents, 898 F.2d 533 (7th Cir. 1990); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Nor, contrary to this judge's holding, is Mann required to show that the defendants harbored gender-based "animus." King v. Board of Regents. Mann need only show that the terms and conditions of her employment were altered by the discriminatory conduct. Price Waterhouse.

The judge states that he granted summary judgment in these two counts because "[t]here was, in other words, no reason for defendant Montgomery not to rely upon defendant O'Hara's evaluations in making the decision to terminate plaintiff." (A-61 -62.) Apart from the issue of whether it was necessary for Mann to show knowledge by Montgomery of O'Hara's gender-based motive for his conduct in order for her to maintain a claim of gender discrimination either against the City under either Title VII or against O'Hara under 28 USC 1983, *the judge himself acknowledged that Mann had complained to Montgomery about O'Hara's treatment of her and that she had described the treatment.* (App. at A-61.)

Montgomery, asked, "Did you make any effort to determine whether she had good reason to bitch about her treatment?" answered, "Well, to some extent, I was aware of some good reason that she had to bitch about her treatment because I was aware that evaluations that I got from Tim were

not all as candid as they could have been." (Tr. 97-98.) *Montgomery also acknowledged that Mann had handed him a six-page document listing specifics of her job record* that, if true, proved O'Hara's evaluations false, and *acknowledged that he did read the document* (Tr. at 96-98; 152). The judge said that this all meant that Mann was complaining that O'Hara's evaluations of her were too high, not that they were too low, but Montgomery's interpretation was otherwise; at trial, *Montgomery said he recognized that Mann's complaint concerning O'Hara's evaluations of her were that they were too low, not that they were too high.* (Tr. 99). Montgomery was aware that O'Hara harbored no hesitation in submitting defamatory evaluations of Mann.

Moreover, the evaluations themselves were *facially questionable*. They failed to rate Mann at all in key categories; they contained inherent contradictions; they contained overtly irrational statements. Further, Montgomery testified that he was aware that Torts Division attorneys other than Mann had had problems with judges (Doc. # 321, Montgomery. dep. at 40-44).

It has occurred to Mann that this judge's findings of "no evidence" or "no reason" have taken on a Mad Hatter connotation in this case; the judge has used those phrases most often when the evidence he says does not exist was explicit and was definitive of the issue at hand.

Nor does a finding that a lack of knowledge by Montgomery of gender-based motive by O'Hara end the inquiry into liability on these two counts. With respect to Count VII, brought by virtue of 42 USC 1983, O'Hara himself was a named defendant, as was Barnard. With respect to Count XIII, brought by virtue of 42 USC 2000e et. seq., that statute and its regulatory guidelines bar gender-based discrimination (including harassment) *by supervisors*, whom it includes in its definition of the term "employer." (App. at A-82; A-83(a)); Meritor Savings Bank v. Vinson, 477 U.S. 57.

Other of the judge's findings are his own fiction, as well:

> "Montgomery concluded that plaintiff's poor job performance justified terminating her....(D)efendants produced evidence that the decisionmaker, defendant Montgomery, terminated plaintiff for poor job performance; and plaintiff failed to produce evidence that this reason was a pretext for sex discrimination. This court accordingly granted defendants summary judgment on the Supplemental Complaint." (App. at A-6 -62.)

This is the total reference the judge makes to evidence produced either by Mann or by the defendants concerning the quality of Mann's job performance. He makes this defamatory generic finding, but *cites to no evidence of poor job performance on the part of Mann.* He provides no indication of what it is that he thinks Mann did not disprove. In fact, no evidence exists in the record that could support a conclusion that Mann performed her job poorly, but *the record is replete with evidence to the contrary, most of it in testimony by O'Hara.* (See Statement of Facts, above.) The record also includes Barnard's testimony that the statement contained in the original Exit Interview Report, that Mann was discharged for "inadequate performance of duties," was inaccurate. (Tr. 592-93).

As for Mann's Count VII, the judge said he granted summary judgment in favor of the defendants because Mann "did not present evidence that Montgomery harbored discriminatory intent." (A-63.) Mann did produce evidence that Montgomery *knew of O'Hara's* discriminatory intent when he "rubber-stamped" it, however, as did Barnard, who also was a defendant in Count VII. Nor did this judge challenge the truth of Mann's allegations that the conduct of *O'Hara, the key defendant in Count VII,* constituted *obviously "purposeful and intentional acts."* Mann's allegations against O'Hara included O'Hara's admitted decision to deny Mann pay

raises that he provided for all the other attorneys in the Torts Division irrespective of their job performance, and his submission of defamatory job performance evaluations of her that he knew were false and that ultimately and foreseeably were used to justify the destruction of her career.